MBF LEASING SDN BHD

v.

CHEOK LAI CHEN & ANOR

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 12-55-2000]
18 JUNE 2003

HIRE PURCHASE: *Hire purchase agreement - Validity - Ownership of goods - Whether ownership of goods passed to first defendant upon payment of deposit - Terms and conditions of agreement - Whether agreement executed was a bill of sale - Whether a genuine hire purchase agreement*

This was an appeal by the plaintiff against the decision of the sessions court judge who dismissed its claim against the defendants in the sum of RM126,470.04. Briefly, the facts were that the plaintiff and the first defendant had entered into a hire purchase agreement where the second defendant was a guarantor. The subject matter of the agreement was one unit of an excavator and the first defendant had made a down payment of RM49,000 to the dealer at Auto Link Holdings Sdn Bhd ('Auto Link') and the balance to be settled by the hire purchase facility. Subsequently, the first defendant was unable to service the instalments. The defendants submitted that the ownership of the excavator had passed to the first defendant when the latter paid the first deposit. Hence, the issue before the court was whether the hire purchase agreement ('the agreement') executed between the plaintiff and the first defendant was a bill of sale under the Bills of Sale Act 1950.

Held:

[1] Prior to the deposit payment made by the first defendant, there was already a letter of offer containing all the terms of a hire purchase agreement which had been accepted *in toto* by the first defendant, and which had been formalised in the agreement. Further, the payment of the said deposit in respect of the excavator was subject to the terms and conditions of the agreement. The first defendant's payment of RM49,000 to Auto Link was a mere agreement for sale, *ie*, an executory contract of sale, and so title or ownership in the excavator was not to pass to the first defendant until

satisfactory agreement had been made for the payment of the balance of the purchase price. Accordingly the agreement was a genuine hire purchase agreement and hence the plaintiff's claim must succeed. (pp 190 e, 191 f-g & 195 c-d)

[Appeal allowed with costs; order of sessions court set aside.]

Case(s) referred to:
BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal [2000] 2 CLJ 197 CA ***(dist)***
Kan Yeow Wing v. Keng Soon Motor Finance Co [1962] 28 MLJ 391 ***(refd)***
Low Ping Ming v. MBf Finance Bhd [2000] 2 CLJ 307 HC ***(dist)***
Malayan Credit Ltd v. Mohamed Kassim [1965] 2 MLJ 134 ***(refd)***
MBf Finance Bhd v. Cahaya Luas Sdn Bhd & Ors [2002] 5 CLJ 32 HC ***(refd)***
North Central Finance Co Ltd v. Brailsford & Anor [1962] 1 All ER 502 ***(refd)***

Legislation referred to:
Bills of Sale Act 1950, s. 3
Sale of Goods Act 1957, ss. 4, 19(1), 20

For the plaintiff - TT Leong; M/s Tunku Amiruddin & KK Chew
For the defendants - Nizam Bashir; M/s Bashir & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant plaintiff ("the plaintiff) against the decision of the learned sessions court judge who on 6 September 2000 dismissed the plaintiff's claim against the defendants in the sum of RM 126,470.04 and costs.

By consent of the respective learned counsel for the parties herein, the question for determination has been stated by them as follows:

> Whether the hire purchase agreement dated 24 March 1997 executed between the plaintiff and the first defendant ("the agreement") is a bill of sale under the Bills of Sale Act 1950?"

They have also agreed that if the answer to this question is in the affirmative, the plaintiff's claim must fail. Conversely, the plaintiff's claim must succeed if the answer is in the negative.

Uncontroverted Facts

The uncontroverted facts of this case reveal that the agreement began with the words "This Hire Purchase Agreement".

The second defendant executed a document entitled "Guarantee on Hire Purchase Agreement" in favour of the plaintiff in consideration of the plaintiff and the first defendant entering into the agreement at the second defendant's request. The second defendant has guaranteed "the due and punctual payment of all sums which may become due to you under or arising out of the said Hire Purchase Agreement and the due performance of the Hirer of each and every term and condition in the said Hire Purchase Agreement to be performed and observed by the Hirer".

The prelude to the agreement was the first defendant's application to the plaintiff for hire purchase facility of RM196,000 which was approved by the plaintiff's letter dated 4 March 1997 to the first defendant, wherein detailed terms and conditions were expressly stated in four typewritten pages. The first defendant has accepted these terms and conditions *in toto.*

The subject matter of the agreement was one unit of reconditioned Hitachi excavator valued at RM245,000. On 15 March 1998, the first defendant made a down payment of RM49,000 to the dealer Auto Link Holdings Sdn Bhd and the balance was to be settled by the first defendant by the hire purchase facility given by the plaintiff and that facility was repayable in 36 months at RM6,703 per month for 35 months commencing on 24 April 1997 and the 36th instalment at RM6,671.

The first defendant was unable to satisfactorily service the instalments. As at 24 June 1998, pursuant to the agreement, the first defendant has paid only 11 instalments amounting to RM73,733. At the first defendant's request, the plaintiff and the first defendant executed a supplemental agreement to the "Hire Purchase Agreement" whereby the instalments were rescheduled for payment over a period of 48 months at RM4,587 per month, commencing on 24 June 1998. Notwithstanding that, the first defendant failed to perform the terms of the supplemental agreement.

Counsel's Submissions And Decision On Appeal

Cik TT Leong, learned counsel for the plaintiff, submitted that the first defendant's payment of the deposit sum RM49,000 to the dealer Auto Link Holdings Sdn Bhd on 15 March 1997 did not constitute a contract of sale, and even if there had been a contract of sale, it had been superseded by the hire purchase agreement and the supplementary agreement executed between the plaintiff and the first defendant.

En. Nizam Bashir, learned counsel for the defendants, contended that the issue for determination by the court is whether the agreement is a real and true hire purchase agreement and he answered it in the negative as the ownership of the excavator has passed to the first defendant when the deposit was paid by the first defendant to Auto Link Holdings Sdn Bhd on 15 March 1997.

The respondent relied on the following authorities:

(1) *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal* [2000] 2 CLJ 197 CA;

(2) *Low Ping Ming v. MBf Finance Bhd* [2000] 2 CLJ 307;

(3) *MBF Finance Bhd v. Cahaya Luas Sdn Bhd & Ors* [2002] 5 CLJ 32;

(4) *Kan Yeow Wing v. Keng Soon Motor Finance Co.* [1962] 28 MLJ 391;

(5) Section 3 of the Bills of Sale Act 1950 (Act 268).

The learned sessions court judge stated in his grounds of judgment that the first defendant did not deny executing the agreement to finance the transaction therein and the outstanding sum. His sole ground for dismissing the plaintiff's claim is that the agreement is not a hire purchase transaction on the basis of *Low Ping Ming, supra.* There was no finding by the court below as to whether the agreement is a bill of sale.

In my judgment, it must be observed that the plaintiffs application in *Low Ping Ming, supra*, was by way of originating summons and the facts revealed that the plaintiff had applied for a loan from the defendant to finance the purchase of a machine and which loan was approved by the defendant upon the plaintiff entering into a hire purchase agreement with the defendant. The plaintiff had failed to pay the instalments in accordance with the hire purchase agreement. As a result, the defendant took possession of the machine. The plaintiff intended to purchase the machine from one Avian Engineering Malaysia Sdn Bhd (the dealer) apparently for an agreed price of RM196,326, and made initial payments amounting to RM35,000 after which the machine was delivered to him on 15 November 1996. The plaintiff thereafter approached the defendant for the loan to settle the balance of the purchase price to the dealer.

Steve Shim J (now CJ (SS) held as follows:

> Given the factual scenario above, two factors have clearly emerged: (1) that at the material time of the transaction between the plaintiff and the dealer in respect of the purchase of the said CAR 5886, the defendant was a stranger as the said agreement only came into existence on 23 December 1996; (2) that at the time of the execution of the said agreement on 23 December 1996, the title to the said CAR 5886 and therefore its ownership would have been vested in the plaintiff since the plaintiff had, as I have said, made the initial payment as part-payment of the purchase to the dealer on 21 October 1996 and 4 November 1996 respectively and had also taken delivery of the same on 15 November 1996. That being the position, the defendant would have no title or ownership in the said CAR 5886 at the time when the said agreement was executed on 23 December 1996 nor was there any consideration for the option to purchase by the plaintiff at the material time. In the absence of such an essential characteristic or feature, the said agreement could not be regarded as a real hire-purchase agreement.

The learned judge made it clear in the judgment that the central thrust of the plaintiff's application is directed entirely at the validity of the hire purchase agreement.

In the instant appeal, the facts were that prior to the payment by the first defendant of the deposit of RM49,000 on 15 March 1997, the plaintiff was not a stranger to the transaction between the first defendant and Auto Link Holdings Sdn. Bhd in respect of the excavator, because as alluded to above, on 4 March 1997, there was already a letter of offer containing all the terms of a hire purchase agreement which had been accepted *in toto* by the first defendant, and which had been formalised in the agreement.

Further, the payment of the said deposit by the first defendant in respect of the excavator was subject to the terms and conditions of the agreement. That being the case, I am of the view that the first defendant could not be said to have been vested with the ownership or title of the excavator.

The facts in the instant appeal are clearly distinguishable from those in *Low Ping Ming, supra*. The facts in the instant appeal bear a remarkable resemblance with those in *Malayan Credit Ltd v. Mohamed Kassim* [1965] 2 MLJ 134, where the defendant entered into a hire purchase agreement with the plaintiffs on 28 August 1963 whereby the defendant agreed to hire a motor car from the plaintiff. On the same date, the defendant took delivery of the motor car, as the defendant had paid a booking deposit of RM100 to the dealer Universal Cars Ltd on 27 August 1963. Upon being sued by the plaintiff for default in payment under the agreement, the defendant pleaded that at all

material times he was the sole owner of the motor car and that the agreement was a bill of sale within the meaning of the then Bills of Sale Ordinance (now Act) 1950.

Hepworth J held as follows:

> ... It was in my opinion as I have said an agreement for sale and it was clear from what happened that the intention was that the property in the said motor-car was not to pass until satisfactory arrangements had been made for the payment of the balance of the purchase price.
>
> The term "contract of sale" includes both actual sales and agreements for sale. It is important to distinguish clearly between the two classes of contract. An agreement to sell, or, as it is often called, an executory contract of sale, is a contract pure and simple; whereas a sale, or, as it is called for distinction, an executed contract of sale is a contract plus a conveyance. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* also is transferred.
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> ...
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> In other words, although there was an agreement between Universal Cars Ltd and himself for the sale of the said motor-car to him the property in the said motor-car had not then passed to him, and he agreed that instead of the completion of the sale to him the said motor-car should be sold to the plaintiffs on the understanding that they would enter into a hire purchase agreement with him.
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> In these circumstances the agreement is not a bill of sale.

(see also s. 4 of the Sale of Goods Act 1957)

I am inclined to the above view of Hepworth J and hereby apply it to the instant appeal, in which case, I hold that the first defendant's payment of RM49,000 to Auto Link Holdings Sdn. Bhd is a mere agreement for sale ie, an executory contract of sale, and so title or ownership in the excavator was not to pass to the first defendant until satisfactory agreements had been made for the payment of the balance of the purchase price. Section 19(1) of the Sale of Goods Act 1957 provides that the conduct of the parties *viz.* the first defendant and the vendor Auto Link Holdings Sdn. Bhd and the circumstances of the case are important for the purposes of ascertaining their intention.

In *BSNC Leasing Sdn Bhd, supra,* one of the issues before the Court of Appeal was whether the property in the turbine which was the subject matter of a hire purchase agreement had ever passed to BSNC Leasing. There, Sabah Shipyard entered into a contract with Wing Teik to purchase the turbine. That contract was made sometime in June 1995 for the turbine to be delivered and paid for later. Wing Teik and Sabah Shipyard did not express any intention as to when property in the turbine will pass from one to the other. Neither is there any form of conduct or circumstances from which such intention is to be deduced. The Court of Appeal held that the property in the turbine passed from Wing Teik to Sabah Shipyard, after having applied s. 20 of the Sale of Goods Act 1957 which reads:

> Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.

The Court of Appeal held that there was not a shred of evidence to show that the turbine had been sold to BSNC Leasing at any point of time before the execution of the hire purchase agreement which the Court of Appeal declared as an unregistered bill of sale and not being in the statutory form was non-registrable and void, in which case BSNC was refused leave to repossess the turbine. The facts in that case are similar to those in *Low Ming Ping, supra,* but not in the instant appeal.

In *Kan Yeow Ming, supra,* the question was whether certain agreements manifestly for the hire purchase of motor vehicles should be declared void for non-registration as bills of sale under the Bills of Sale Ordinance (now Act) 1950. The facts of that case show that the plaintiff was pressed by pawnbrokers, his creditors and sold five lorries to the defendant and simultaneously entered into hire purchase agreements in respect of the lorries.

The plaintiff defaulted in the payment of his monthly instalments and upon demand from the defendant, prayed for a declaration that the said hire purchase agreements were void bills of sale.

Ong J (later CJ(M) followed the judgment of Cairns J in *North Central Finance Co. Ltd v. Brailsford & Anor* [1962] 1 All ER 502 and enunciated the principles applicable in determining whether a hire purchase agreement is a bill of sale and void for registration as follows:

(i) if a person deliberately, with a clear understanding of what he is doing, and with all appropriate formalities, sells his property to a finance company and then hires it back under a hire-purchase agreement, the agreement is not a bill of sale (*Yorkshire Rilway Wagon Co v. Maclure* [1882] 21 Ch D 309), a decision of the Court of Appeal; and *British Railway Traffic & Electric Co v. Kahn* [1921] WN 52, a decision of Rowlatt J;

(ii) if the purpose of the transaction is to enable the hirer to dispose of the property to a customer, the courts will more readily hold that the agreement is not a bill of sale (*Staffs Motor Guarantee Ltd v. British Wagon Co Ltd* [1934] 2 KB 305, a decision of MacKinnon J);

(iii) if the hire-purchase agreement is a mere device to cloak a loan, the document is a bill of sale (*Maclure*'s case, per Lindley LJ);

(iv) in considering whether the real transaction is one of loan, it is necessary to look behind the documents to discover its true nature (*Polsky v. S* 85 A Services, *S & A Services v. Polsky* [1951] 1 All ER 185), a judgment of Lord Goddard CJ affirmed by the Court of Appeal;

(v) if the facts are not truly stated in the documents, there is a circumstance tending to show that the documents are a mere cloak (*Polsky*'s case).

The learned judge held at p. 393 that:

> The fixing of unrealistic prices having no relation to the true values of the vehicles, and the notional setting off of the initial payments therefore makes the conclusion inevitable, that the prices and initial payments were tailored to suit the plaintiff's requirements for adequate cash accommodation to repay the pawnbrokers, in other words, to substitute one creditor for another and that the true purchase agreements were not a mirror of the truth.
>
> I accordingly find that the transaction was one of loan on security rather than a genuine sale and reletting on hire-purchase. The plaintiff accordingly succeeds, and he is entitled to both the declarations prayed, because there was non-registration under the Bills of Sale Ordinance and no memorandum of the contract of loan as required by s. 16 of the Moneylenders Ordinance. The defence of estoppel cannot arise and the counterclaim for arrears of hire likewise fails.

The facts in that case were somewhat dissimilar from those in the instant appeal where the plaintiff and the first defendant had from 4 March 1997 agreed to the terms of the hire purchase arrangement and so the agreement was not a mere device to cloak a loan, as in para (iii) above. Further, it seems clear to me that the documents executed by the parties herein were reflections of their true nature and there was nothing behind them to the contrary.

Parliament in its wisdom has provided for a comprehensive definition of a bill of sale in s. 3 of the Bills of Sale Act 1950 as follows:

> "bill of sale" includes bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase money of goods, and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon is conferred, but does not include the following documents:
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> (a) assignments for the benefit of the creditors of the person making or giving the same;
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> (b) ante-nuptial marriage settlements;
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> (c) transfers or assignments of any ship or vessel or share thereof;
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> (d) transfers of goods in the ordinary course of business of any trade or calling;
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> (e) bills of sale of goods in foreign ports or at sea;
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> (f) bills of lading, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of such documents to transfer or receive goods thereby represented;
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> "bill of sale" also includes, as regards any personal chattels which may be seized or taken thereunder, every attornment, instrument or agreement whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance or otherwise for the purpose of such security only, but does not include or extend to any mortgage or charge of any estate or interest in any land which the mortgagee or chargee being in possession demises to the mortgagor or chargor as his tenant at a fair and reasonable rent;

> "bill of sale" also includes agreements for the hire of personal chattels entered into for the purpose of securing the repayment to the lessor of such chattels of money advanced by him to the hirer; and the hirer shall in every such case be deemed to be the grantor of the bill of sale and the lessor shall be deemed to be the grantee thereof;

Learned counsel for the defendants have not identified which particular portion of the above definitions of a "bill of sale" would apply to the facts of the present case.

The burden is on the defendants to establish that the facts of the case herein would attract the application of the specific definition of a bill of sale to render the transaction void, but the defendants have failed to do so.

Accordingly, I hold that the agreement is a genuine hire purchase agreement and hence the answer to the question for consideration in this appeal is in the negative, in which case the plaintiff's claim must succeed. I therefore allow this appeal with costs, set aside the said order of the lower court, and make an order in terms of the plaintiff's claim.